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No. 80-1350

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

COMMUNITY COMMUNICATIONS COMPANY, INC.
Petitioner,

v.

CITY OF BOULDER, COLORADO, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE TENTH CIRCUIT COURT OF APPEALS

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I.

SUMMARY OF PETITIONER'S REPLY

In *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a majority of this Court rejected *per se* municipal immunity from the antitrust laws because of concerns about the effect on competition caused by giving municipalities free hand to make their own economic choices without regard to their anticompetitive effects, 435 U.S. at 408. And, speaking for four members of the Court, Justice Brennan rejected the argument that since "municipalities may exercise the sovereign power of the State, . . . any actions which municipalities take necessarily reflect state policy and must therefore fall within the Parker doctrine." *Id.* at 413. Respecting our unique system of dual sovereignty, the plurality explained that "[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them." *Id.* at 412.

Nevertheless, Respondent and the *amici* which support it strain to find a loophole through which a specific class of antitrust defendants (home rule cities and counties) can pass to avoid compliance with the Sherman Act. Repeating the very arguments advanced by the Louisiana municipalities and adopted by Justice Stewart, Respondent asks this Court to do no less than overrule its *City of Lafayette* decision and inject "a wholly arbitrary variable into a 'fundamental national economic policy,' [citation] which strongly disfavors immunity from its scope." *Id.* at 419-20 (Burger, C.J., concurring).

Respondent argues that home rule entities, when acting on a matter of purely local concern, become the state and are thus entitled to the state action immunity recognized in *Parker* v. *Brown,* 317 U.S. 314 (1943). Respondent maintains that since Boulder's actions over "the purely local matter of cable television" cannot be countermanded by legislation enacted by the Colorado General Assembly, Boulder's cable ordinances are "state action" reflecting the State's policy to displace competition, supervised by the State (*i.e.,* Boulder) itself. It appeared that the Tenth Circuit shared this view. (*See,* P.A. A-29, Markey, C.J. dissenting).

On September 21, 1981, however, the Tenth Circuit rendered its second decision in this litigation, *Community Communications Co.* v. *City of Boulder,* No. 80-1882, attached as Appendix (Reply App.) to this brief. The district court had held that Boulder's districting ordinance violated both the antitrust laws and the First Amendment and had enjoined its enforcement. 496 F.Supp. 823 (D.Colo. 1980).

The Tenth Circuit reversed, finding that the antitrust question was controlled by its prior decision and that the First Amendment issues required a full trial on the merits. Significantly, the court stated that it had made no finding in its first opinion that cable television was a matter of *purely* local concern:

> We did not hold in *Boulder I* that cable television is a matter of *purely* local concern . There may be a significant state interest in many aspects of this communication medium. A home rule city may pass legislation regarding a "matter of 'mixed' state and local concern," provided the regulations do not conflict with legislation enacted by the state. [Citations].

Slip. Op. at 6 n.3, Reply App. at 4.

If cable television is of a mixed state and local concern as the Tenth Circuit now appears to recognize, the Colorado General Assembly may legislate on it, and to the extent they conflict, the provisions of such legislation will override cable regulations of home rule cities, including Boulder.[1] Respondent and their *amici,* therefore, are now bereft of any support (if any existed) for the contention that, in the area of cable television, home rule cities are "the ultimate bod[ies] wielding the State's power." *Bates* v. *State Bar of Arizona,* 433 U.S. 350 (1977).

Deprived of the linchpin of its position, Respondent's argument can only rest on the theory that when "there is no interaction of state and local regulation [but] only the action or exercise of authority by the City" (*Community Communications Co.* v. *City of Boulder,* P.A. A-6), *Parker* applies.

The *City of Lafayette* plurality, however, rejected this test, explaining that State silence signified—at the most—neutrality and *not* an expression of state policy permitting immunity for cities as state agencies implementing state policy. *City of Lafayette, supra,* 435 U.S. at 411.

Respondent's brief and the Tenth Circuit decision which it extols are frontal assaults on *City of Lafayette.* While Respondent attempts to harmonize municipal action taken pursuant to broad home rule authority with the standards announced in *City of Lafayette,* in reality it asks the Court to adopt a position squarely at odds with this Court's pronouncements. Simply stated, the plurality's desire to thwart anticompetitive action of local government is diametrically opposed to Respondent's desire to allow each and every home rule entity to express its own anticompetitive policy. As valiantly as Respondent may try, it cannot stretch the plurality's "contemplated" language to fit the *per se* immunity it urges for anticompetitive acts of home rule cities acting over matters of local concern.

A telling weakness in Respondent's analysis is its failure to recognize that the *City of Lafayette* Court was aware of the authority vested in home rule cities over matters of local

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[1] Respondent carefully sidesteps this point by referring only to "local" matters. Distinguishing between "purely local" and "mixed state and local" matters, however, is crucial to analyzing the present situation. Respondent's extensive discussion of home rule autonomy is not even relevant unless cable television is a matter of *purely* local concern. If it is mixed, then state legislation prevails. *Community Communications Co., supra,* No. 80-1882, fn. 3 (and cases cited therein).

concern. In fact, the very existence of this broad authority compelled the plurality to require a state mandate for local anticompetitive action rather than face a plethora of parochial economic policies enacted without regard to that "Magna Carta of free enterprise," the Sherman Act. *United States* v. *Topco Associates,* 405 U.S. 596, 610 (1972). Respondent complains that Petitioner's interpretation of the plurality opinion contravenes the rationale behind home rule. Respondent's objection, however, ignores the Supremacy Clause of the Constitution by vaulting the local policies of home rule cities over the national legislature's decision to preclude restraints on trade. *See* opinion of Markey, C.J., P.A. A-24.

Recognizing the evident inconsistency between the plurality opinion and the extension of immunity to the literally thousands of home rule cities acting in the absence of a state policy to displace competition, Respondent asks this Court to "clarify" *City of Lafayette.* However, the arguments advanced for this clarification (i.e., overruling) of recent controlling precedents have already been considered and rejected by a majority of the Court. The principle of *stare decisis* compels the rejection of these stale arguments, particularly in light of no Congressional action whatsoever to "clarify" the decision. The Respondent and its allies must accept the finality of the *City of Lafayette* decision.

Respondent's historical arguments evidence a basic unfamiliarity with the events surrounding the drafting and adoption of our Constitution. The Framers were distressed by the ineffectiveness of a government based on a confederation of states. These federalists sought an effective central government, not an ineffective one as Respondent implies. Certainly Madison would never have countenanced municipal power to make economic policy directly contrary to that enacted by the national Congress. In his view, any harm perceived by these local interests could be rectified by congressmen, primarily loyal to their local areas. The Federalist, No. 46.

Finally, Respondent overlooks the boon to competition effected by *City of Lafayette.* The opinion of the District Judge in this very case makes the point clear. The City argued that competition would be enhanced by the moratorium it imposed. The District Judge found otherwise. He found that there was no "natural monopoly" and that competition on the poles in the Boulder cable market was both economically and physically

possible (P.A. A-41). Even though he believed that Boulder possessed the power of the state over matters of local concern, he concluded that Boulder's scheme of market control, unconnected with normal regulation of public rights of way, was not entitled to immunity (P.A. A-42). To paraphrase the Chief Justice, in the District Court's view, control of cable television did not possess those "attributes of sovereignty" which in the mind of the Chief Justice, are one of the prerequisites to immunity. 435 U.S. at 423.

Perhaps the strongest argument dictating rejection of Respondent's attack on *City of Lafayette* is the action which followed the Tenth Circuit decision. Believing that it had antitrust immunity, and with complete disregard for the substantial evidence that districting would not lead to competition, Respondent divided the city into cable districts, notwithstanding its earlier protestations to the contrary.

II.

HOME RULE CITIES WERE EXPLICITLY INCLUDED WITHIN THE AMBIT OF *CITY OF LAFAYETTE*—A CONTRARY READING RENDERS THAT DECISION INCOMPREHENSIBLE

In *City of Lafayette,* this Court considered whether the antitrust laws apply to the anticompetitive practices of local governments. The majority was concerned that the grant of antitrust immunity to more than 60,000 units of local government would seriously distort "the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." 435 U.S. at 408. Thus cities were held not automatically immune from the antitrust laws.

Nonetheless, Respondent seeks to carve out an exemption from this holding so that home rule governments may obtain that immunity reserved to the states pursuant to *Parker* v. *Brown,* 317 U.S. 341 (1943). Respondent commences its defense of the Tenth Circuit decision with a primer on the development of home rule in general and Colorado home rule in particular. The aim of this historical exercise is to demonstrate how American cities, chafing under excessive state control, obtained autonomy over local affairs. Petitioner readily acknowledges the success of that effort in Colorado and throughout the country. (Chart following P.Br. App.)

Petitioner also agrees that, in instances of conflict between an ordinance of a Colorado home rule city on an issue of *purely* local concern and a statute enacted by the General Assembly, the ordinance prevails. Even assuming, arguendo, that cable television is a matter of purely local concern[2]—over which the General Assembly may not legislate in the face of contrary ordinances—the local autonomy which gives home rule cities plenary power over their affairs does not tranform these units of municipal government into states eligible for *Parker* immunity.[3]

The plurality notes that "[w]hen cities, each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the State." 435 U.S. at 414. The plurality, quite significantly we submit, supports this statement

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[2] Petitioner re-emphasizes that there has never been a finding by any Colorado court that cable television is a matter of purely local concern. *See, Community Communications Co.* v. *City of Boulder,* Memorandum Opinion and Order (P. A-36, A-41).

The Court of Appeals appeared to disregard this district court finding, relying instead on *Manor Vail Condominiums* v. *Town of Vail,* ____ Colo. ____, 604 P.2d 1168 (1980). The failure of the *Manor Vail* court even to consider the issue and the absence of conflicting state legislation which would have prompted such consideration undercuts use of *Manor Vail.* Other Colorado cases offer no clearcut guidance. *See, e.g., Denver Urban Renewal Authority* v. *Byrne,* ____ Colo. ____, 618 P.2d 1374 (1980) (urban blight is not purely local); *Century Electric Service & Repair, Inc.* v. *Stone,* 564 P.2d 953 (1977) (licensing of electrical contractors within city limits is of statewide concern); *Spears Free Clinic & Hospital* v. *State Board of Health,* 122 Colo. 147, 220 P.2d 872 (1950) (licensing of city hospitals is of statewide concern). Clearly, any conclusion that cable television must be of purely local concern since it only occurs within city limits is unjustified.

[3] Amicus Colorado Municipal League attempts to discredit the fact that only the state may declare state policy by noting that the principal Colorado case on point has been "overruled in part." (CML Br. at 15). Amicus fails to explain that *City and County of Denver* v. *Tihen,* 77 Colo. 212, 235 P.2d 777 (1925), still is good law on the point for which Petitioner cited it. Only the particular finding of the court was overruled. *Century Electric Service & Repair, Inc., supra,* at 954.

Respondent argues that all of the Colorado courts' discussions of home rule cities as lacking the attributes of "city-states" stem only from a pre-1920 constitutional objection. (R.Br. 21). This assertion is simply inaccurate. *City of Golden* v. *Ford,* 141 Colo. 427, 348 P.2d 951 (1960) ("Colorado municipalities are creatures of either legislative enactment or constitutional provision or both, as the case may be, and are not city states."); *City and County of Denver* v. *Sweet,* 138

with a footnote quoting language from *Avery* v. *Midland County*, 390 U.S. 474, 481 (1968), which specifically notes the vast authority local governments may have over matters of local concern:

> While state legislatures exercise extensive power over their constituents and over the various units of local government, the States universally leave much policy and decisionmaking to their government subdivisions. Legislators enact many laws but do not attempt to reach those countless matters of local concern necessarily left *wholly* or partly to those who govern at the local level.

435 U.S. at 414, n. 43 (emphasis added).

The plurality's citation to *Avery* is proof positive that the state mandate test was formulated specifically *because of*, not in spite of, the existence of home rule powers under which Respondent claims immunity.

This reading of the opinion is further supported by the plurality's treatment of a recent Louisiana case, cited by the *City of Lafayette* petitioners. That state case held that municipally-owned public utilities were under the exclusive jurisdiction of the municipalities.

Notwithstanding the Louisiana cities' contention that possession of this plenary power entitled them to immunity, as the ultimate body wielding the State's authority, the plurality saw this autonomy as indicating the *absence*, not the presence, of a state policy on which *Parker* immunity could be predicated.

When read in the context of the entire plurality opinion, the so-called "contemplation" test[4] is simply not susceptible to an interpretation granting home rule entities *Parker* immunity when acting in matters of local concern. The plurality's treatment of *Avery* v. *Midland County* and the Louisiana state court decision lead inescapably to the conclusion that immunity for home rule cities was considered and rejected by a plurality, if not a majority, of the Court. Moreover, the dissent's concern

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[4] 435 U.S. at 415. This language should be read to mean that the federal government will defer to a clear and affirmative state policy to displace competition even if it is not expressed in a "specific, detailed legislative authorization." However, there must still be a *state* policy, and it must still be clearly expressed. In this case, there is no state policy "whatsoever."

that the plurality opinion would hamper the governmental authority of home rule cities, 435 U.S. 434-35 nn. 14 & 15, a concern reflected in Respondent's brief, did not alter the majority's conclusion. Thus, placing broad home rule authority within the "contemplation" language of the plurality would eviscerate *City of Lafayette*, for it is precisely this plenary power over local concerns, which overrides contrary state statutes, that would allow a city to express "its own preference, rather than that of the State," or leave cities "free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects." *Id.* at 414,408.

III.

THE CONCURRING OPINION OF THE CHIEF JUSTICE SUPPORTS REVERSAL OF THE TENTH CIRCUIT OPINION

The Petition for Certiorari took issue with the Tenth Circuit's view that Chief Justice Burger would only apply the antitrust laws to municipal activities when the municipality "was in the business" affected by municipal action. P. 15-18. Petitioner emphasized the Chief Justice's consistent refusal to imply exemptions to the antitrust laws, his concurrence in Part I of the plurality opinion, and pointed to his test on remand as more stringent than the plurality's test because it included the requirement of "State" compulsion.[5] 435 U.S. at 425, n.6. It was noted that even if the concurring opinion *had* advocated a proprietary-governmental test, Boulder's action was proprietary in character.

The concurring opinion should not be read as distinguishing between "proprietary" and "governmental" actions, but rather between a government's " 'functions [which are] essential to separate and independent existence' " and those which are not. *Id.* at 423-24. The Chief Justice noted that Lafayette's actions, as "proprietary" were not essential to the city's existence and therefore fell outside the protection offered by *Parker*. Of course, municipal action besides that characterized as "proprietary" would also render cities liable, but the Chief Justice saw no reason to extend his opinion to such cases.

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[5] Petitioner's interpretation of Chief Justice Burger's test finds additional support in a recent Ninth Circuit case. *Community Builders, Inc.* v. *City of Phoenix*, 652 F.2d 823, 829 (9th Cir. 1981).

The Chief Justice did state, however, that in reviewing allegedly anticompetitive municipal conduct, he would only exempt action which " 'was necessary in order to make the regulatory Act work, and even then only to the minimum extent necessary.' " *Id.* at 426. The reference to a "regulatory" act is an obvious reference to "governmental" as opposed to "proprietary" action.

We note that the trial judge engaged in this very analysis. He recognized that the city could "impose such restrictions on the hanging of cables as may reasonably be necessary to protect the public and other franchise users of such property." P.A. A-41. However, he concluded that Boulder's actions went beyond what was necessary to the valid regulation of cable television, and the city was thus not entitled to exemption.

> Assuming that Boulder does have the claimed authority to regulate cable television within the City in the manner which would be required to impose all of the terms and conditions in the draft ordinance which was submitted to the plaintiff and other cable companies, the approach taken is not an appropriate exercise and articulation of a policy of regulation. It is not characteristic of utility regulation for the regulating authority to negotiate with those to be regulated and then formulate the final policy by exercising legislative power through an offer and acceptance mechanism.

Id. A-42. In other words, Boulder's actions were not "essential to [its] separate and independent existence." 435 U.S. at 423. The city had other, less restrictive alternatives available to make its regulation of cable television work. *Id.* at 426. As the trial court noted:

> It might well be a different case if Boulder had enacted an ordinance articulating qualifying criteria for cable companies to do business in the City, with such other regulations as the government might believe to be necessary and proper in the exercise of police power, and then to confront the contention that such an ordinance has an anticompetitive effect. That is not this case.

P.A. A-42.

IV.

RESPONDENT'S REQUEST FOR "CLARIFICATION" ADVANCES STALE ARGUMENTS REJECTED BY THE COURT IN CITY OF LAFAYETTE. CONGRESSIONAL SILENCE SINCE THAT DECISION JUSTIFIES RELIANCE ON STARE DECISIS TO REJECT THESE ARGUMENTS AGAIN.

Part II of Respondent's Brief asks this Court to clarify *City of Lafayette*. The arguments advanced to support this "clarification," however, were raised by the Petitioners in *City of Lafayette*, adopted by the dissent, but rejected by a majority of this Court. Thus, Respondent's argument that the Sherman Act was not intended to impose liability on municipal governments simply restates the arguments set forth in pages 8, 9 and 16 of the Petitioner's brief in *City of Lafayette* (Pet. Br. No. 76-664), and advanced in the Stewart dissent. 435 U.S. at 392-93.[6]

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[6] A careful examination of the Act's legislative history does not support the contention that Congress never intended the antitrust laws to apply to acts of local governments. While the question of governmental liability was never addressed during the debates, the Congressional Record does indicate that the Act was aimed primarily at the harmful effects of anticompetitive *conduct* rather than a given class of actors. *See* Slater, *Antitrust and Government Action*, 69 N.W. L. Rev. 83 (1974). Attempts to restrict the reach of the Bill to private business combinations were defeated.

> [T]he provisions of this Bill are not confined to trusts, to combinations, to arrangements and agreements made between parties who are engaged in business; . . . but it brings within its grasp arrangements made by any persons, though merely for moral and defensive purposes.

20 Cong. Rec. 1458 (1889) (Senator George).

The prospect that the Act might inadvertently punish beneficial combinations while permitting harmful ones to evade liability inspired Senator Teller's remarks about "these great trusts, these great corporations, these large moneyed institutions." 21 Cong.Rec. 2562 (1890). He argued, along with several other senators quoted by Respondent, that the Bill should be more narrowly drafted so as to apply only to business combinations such as the Standard Oil Trust.

However, Senator Sherman defended the broad sweep of the Bill's provisions. As he construed it, the Act would not restrain literally "all" combinations, but rather, those "[whose] natural effects are injurious [and] tend to produce evil results." 21 Cong.Rec. 2456 (1890). He argued that Congress should not limit the scope of the

(footnotes continued on following page)

Respondent's parade of horribles also was argued to the Court by the Louisiana cities, reargued by the dissent, and rejected by the majority. The dissent (435 U.S. at 397-400) repeated Lafayette's and Plaquemine's predictions that antitrust liability "will have a chilling effect upon local decision-making and paralyze the functions of local government." Pet. Br. No. 76-864, at 7.

Similarly, the arguments that many aspects of municipal regulation will be subject to antitrust attack (R.Br. 34-36), that courts will have difficulty interpreting the state mandate request (R.Br. 36-37), and that cities should not be forced to seek legislative approval for every act (R.Br. 44), all represent concerns raised by the Petitioners in *City of Lafayette* (Pet. Br. No. 76-864 at 21, 19-20, and 23) and articulated by Justice Stewart (*see, e.g.*, 435 U.S. at 396-400).

Three years have passed since this Court's decision in *City of Lafayette.* Yet no Congressional action has been taken to "clarify" the majority holding that municipalities are subject to antitrust liability in some circumstances.

Since *City of Lafayette,* Congress has enacted two antitrust exemptions.[7] Public Law 96-308 (1980) exempts soft drink manufacturers from certain potential rule of reason violations if interbrand competition is shown to exist. This Act was passed in direct response to ongoing litigation instituted by the Federal Trade Commission. House Report No. 96-1118 (1980). Congress, however, took no action in response to *City of Lafayette,* notwithstanding the dire consequences predicted by Justice Stewart.

(footnotes continued from previous page)

Bill in advance lest its power to remedy the evils of monopoly be likewise limited. Thus, he favored wide applicability, coupled with reliance on judicial discretion to apply the doctrine as needed on a case by case basis. 21 Cong.Rec. 2460 (1890).

[7] P.L. 96-30, 42 U.S.C. 6272(j) (1979) (extending oil companies' exemption when participating in the Agreement on an International Energy Program); P.L. 96-308, 15 U.S.C. 3501 (1980) (soft drink bottlers' exemption). The Senate Judiciary Committee was referred no bills, held no hearings, and took no action on municipal immunity in the session following the *City of Lafayette* decision. *See,* Annual Activities Report of the Committee on the Judiciary, 110-17 (1980).

Respondent essentially asks this Court to ignore the rule of *stare decisis* and overrule *City of Lafayette*. Yet the present fact situation—Congressional silence following a Court decision construing a statute—is precisely one where the doctrine of *stare decisis* is the most persuasive. As this Court stated in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977):

> In considering whether to cut back or abandon the Hanover Shoe rule, we must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation. [Citations]. This presumption of adherence to our prior decisions construing legislative enactments would support our reaffirmance of the Hanover Shoe construction of § 4, joined by eight Justices without dissent only a few years ago, even if the Court were persuaded that [the earlier decision was incorrect].

Id. at 736-37 [footnote omitted].

Similarly, this Court has held that:

> by reason of stare decisis and by reason of Congress' failure to make any statutory change upon again reviewing the subject, we regard the principle enunciated in [an earlier Supreme Court decision] as controlling.

Laird v. Nelms, 406 U.S. 797, 802 (1972) (Rehnquist, J.). *See also, Monell v. Department of City Services*, 436 U.S. 658 (1978) (Rehnquist, J. dissenting). *Cf., Texas Industries v. Radcliff Materials*, ____U.S.____, 68 L.Ed.2d 500, 513 (1981) (Burger, C.J.).

V.

THE REQUIREMENTS OF CITY OF LAFAYETTE HAVE PROVEN WORKABLE AND ARE APPROPRIATE IN THE INSTANT CASE

Although Respondent claims that the *City of Lafayette* decision has resulted in unacceptable limitations upon local governmental actions, lower federal courts have been effectively applying the standards of *City of Lafayette* since that opinion was handed down. The Court's guidance has proven to be well-adapted to the examination of the validity of municipal regulation.

Petitioner's opening brief listed several cases that illustrate that the *City of Lafayette* tests are useful in preventing undesirable anti-competitive conduct of cities (see P. Br. fn. 24 and 30). Since that brief was written, a Ninth Circuit Court of Appeals decision illustrating the feasibility of the *City of Lafayette* tests has been issued. *Community Builders* v. *City of Phoenix,* 652 F.2d 823 (9th Cir. 1981) involved horizontal division of territory for the municipal water utility districts of Phoenix and Scottsdale, Arizona. The plaintiff, located in an unincorporated area between the defendant cities, argued that defendants violated the antitrust laws by not allowing plaintiff to choose which municipal system would serve it. The Ninth Circuit found that the plurality's test of "conduct engaged in . . . pursuant to state policy to displace competition with . . . monopoly public service" was satisfied by Arizona's "explicit policy prohibiting competition between municipalities in the provision of utility service." *Id.* at 829. This, in turn, was based upon an Arizona statute, A.R.S. § 9-516, which sought the "elimination of competition between municipal utility services and other utility providers." *Id.* at 829. Under the Arizona law, "[s]o long as that service [provided by the existing utility] is adequate, Arizona law prohibits the institution of a competing service . . . ." *Id.* at 830. Having determined that water utility service was a natural monopoly (*id.* at 829), Arizona has decided that there will be no competition allowed for utility services, and having done so, thereby exempts municipalities from antitrust liability.

Colorado, however, has no state policy forbidding cable television companies from competing in the market for subscribers. Colorado, in fact, has rejected the notion that cable television is a natural monopoly (*Re The Mountain States Telephone & Telegraph Co.,* (Colo. P.U.C. 1968), P.A. at A-86-88), a finding made again by the trial judge in the instant case, who found that unobtrusive and safe competition on the poles is possible.[8] Furthering the goal of the antitrust laws to "guarantee every enterprise the right to exercise 'whatever economic muscle it can muster' [citation omitted] without regard to the amount of influence it might have with local or state legislatures" (*City of Lafayette, supra,* 435 U.S. at 407),

[8] It is also self-evident that a First Amendment disseminator is not a public utility. *See e.g., Television Transmission Inc.* v. *Public Util. Comm.,* 47 Cal.2d 82, 89, 310 P.2d 862 (1956).

the trial court sought to preclude any further restraint on trade while allowing regulation to protect public safety. The Tenth Circuit's decision and the subsequent city action, permanently restraining competition in the market for the same customers, vividly indicates the damage to competition wrought by exempting municipal governments from the antitrust laws. *Parker* immunity, which must be narrowly confined, only exists because the national policy of free competition is superseded by the even stronger policy of deference to certain clear State action.

Contrary to cries of an impending Armageddon that will allegedly follow a decision permitting competition for cable television subscribers (CTIC amicus brief), America's cities and their residents will not only survive but will prosper under a regimen of free competition. Absent both State action and Congressional interference, it simply cannot be assumed that "monopolistic arrangements will better promote trade and commerce than competition." *National Society of Professional Engineers* v. *United States,* 435 U.S. 679, 689 (1978).

A further look at Phoenix, Arizona reveals that competition for cable television subscribers may be encouraged without destroying the ability of municipalities to govern. The record in this case reveals that Carl Pilnick, Boulder's expert witness, recommended that Phoenix not negotiate more than one permit, (R.T. 146:8-147:7). However, judicial notice can be taken of Phoenix Ordinances which permit three cable companies to serve the entire city while a fourth company requested and was permitted to serve a particular area of that municipality.[9] Phoenix thereby furthered the policy of the antitrust laws to allocate resources more efficiently by allowing consumers to choose which company's product they wish to purchase. The Tenth Circuit would frustrate that policy.

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[9] License No. 17633 between the City of Phoenix and American Cable Television, Inc., dated Nov. 24, 1976 (citywide); License No. 25333 between the City of Phoenix and Cross County Cable dated Sep. 2, 1980 (citywide); License No. 25332 between the City of Phoenix and Camelback Cablevision, Inc. dated Sep. 2, 1980 (citywide); License No. 25334 between the City of Phoenix and Western Cablevision Services, Inc. dated Sep. 2, 1980 (single district).

VI.

RESPONDENT'S FEDERALISM ARGUMENTS ARE UNSUPPORTED BY HISTORY OR THE DOCTRINE OF DUAL SOVEREIGNTY UNDERLYING THE CONSTITUTION AND *PARKER V. BROWN*

A. Respondent Turns The Views of the Framers of the Constitution On Their Heads.

Contrary to Respondent's assertions, the Framers of the United States Constitution did not intend or foresee municipal immunity from fundamental national policy. The purpose of the new Constitution was to create an effective source of national policy. Under the decentralized Articles of Confederation, our Union had suffered from the lack of coordination resulting from thirteen different views of where the public interest lay. *See generally,* The Federalist, Nos. 15-21. To contend, as Respondent apparently does, that Madison and Hamilton would have supported any theory resulting in the freeing of tens of thousands of individual policy-making bodies to choose when and how often to comply with a federal statute can best be characterized as "mistaken."[10]

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[10] Respondent supports its argument by citation to a rhetorical question posed by Madison in The Federalist, No. 45 (R.Br. 41):

> Was then, the American Revolution effected, was the American Confederacy formed, was the precious blood of thousands split, and hard-earned substance of millions lavished, not that the people of America should enjoy peace, liberty, and safety, but that the governments of the individual States, that particular municipal establishments, might enjoy a certain extent of power of sovereignty?

A cursory examination of the surrounding language that Madison referred to the *States* when he referred to "particular municipal establishments." There is not a shred of evidence to indicate his contemplation of cities anywhere in this portion of the letters.

But even more telling is the fact that Madison answers his question with a resounding "No!" and not a "yes" as Respondent implies. The Framers clearly saw a greater public good resulting from a shift of power to the Federal government than from locally and individually determined policies. This greater good required the concession of some powers by the States. Local recognition of this basic fact underlay the ultimate ratification of the Constitution, and was the basis of agreement for a majority of the Justices in *City of Lafayette.*

The Founding Fathers envisioned a shift of authority over national policy from state governments to the federal government. By joining the United States, each State acknowledged federal supremacy in relation to policies adopted for the collective good. One of these limits, as delineated by this Court, denies the States the uncontrolled right to freely delegate their antitrust exemption. Certainly, it cannot be said that the architects of our federal system contemplated a state of affairs where municipal officials would be permitted to flaunt laws enacted by the federal legislature.[11]

Thus, Respondent is unsuccessful in its attempt to invoke historical support for its arguments. Both political theory and political fact reveal that city antitrust exemption should only exist when the state has clearly and affirmatively expressed the desire that the challenged restraint take place.

B. Application Of The National League Of Cities v. Usery Rule Does Not Justify Immunity In This Case

In *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), this Court explained that federal legislation may run afoul of the Commerce Clause if it interfered with "attributes of sovereignty" which are " 'essential to separate and independent existence . . . .' " 426 U.S. at 845.

Contrary to Respondent's reading of the case, this Court made it quite clear that the mere exercise of an "attribute of sovereignty" is insufficient—a showing must be made that the state has exercised "functions essential to separate and independent existence," [citation] so that Congress may not abrogate the States' otherwise plenary authority to make them." *Id.* at 845-46.

Surely Respondent does not contend that the regulation of cable television—and, in particular, the power to exclude a willing cable operator—is a "function essential to separate and

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[11] Hamilton was even more emphatic than was Madison in rejecting the concept of unlimited state and/or local sovereignty.

> "They [the opponents of the proposed Constitution] still, in fine, seem to cherish with blind devotion the political monster of an *imperium in imperio.*"

The Federalist, No. 15 at 108.

It is, of course, one thing to say that particular states may create an *imperium in imperio* (empire within empires) within their borders, but quite another to assert that such creation not only supersedes state policy but federal legislative policy as well.

independent existence." Such action has not been a traditional activity of cities and does not go to the heart of a city's ability to exist as an entity.

The factual background in *Usery* involved states and municipalities handling their own internal affairs. The Court noted that without "the authority to make those fundamental employment decisions upon which their systems for performance of these [public safety] functions must rest, we think there would be little left of the States' " 'separate and independent existence.' " *Id.* at 851.

Usery can be distinguished from the present case by the importance of the federal interest as well. While the Fair Labor Standards Act was but one in a series of commerce regulations enacted in the pre-war period, the antitrust laws "are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States* v. *Topco Associates, supra,* 405 U.S. at 610. They reflect "the fundamental principle governing commerce in this country," *City of Lafayette, supra,* 435 U.S. at 398, and a "fundamental national economic policy . . . ." *Id.* at 419 (Burger, C.J.). Such an overriding federal interest must justify minor limitations upon local autonomy.

Finally, it is by no means clear that the teachings in *Usery* are to be applied with equal force to municipalities as well as states, particularly in applying the antitrust laws. Under every formulation of the municipal/agency exemption, appropriate state action will immunize the city or agency action. Even in Colorado, the State may authorize displacement of competition by home rule cities acting in an area of "purely local" concern. (P.Br. 28-29). Thus, concern for "our dual system of government" *Parker, supra,* 317 U.S. at 351, in no way suggests *municipal* exemptions to the antitrust laws. *City of Lafayette, supra,* 435 U.S. at 412, n. 42.

C. Individual State Law Should Not Be Incorporated Into A Federal Statute Which Reflects A "Fundamental National Economic Policy".

Respondent (R.Br. 12-20) and *amicus* Colorado Municipal League (C.M.L.Br. 6-16) expend considerable energy in attempting to characterize Colorado home rule cities as uniquely empowered to make final determinations of local policies.

Whatever the accuracy of these assertions (see Chart following P.Br. App.), they point out an underlying problem with Respondent's position: The Sherman Act is a *national* law intended to have uniform application throughout the country. Construction of the antitrust laws should not turn on the eccentricities of particular internal state structures. As Justice Stewart noted, "the applicability of the federal antitrust laws is a matter of federal, not state, law . . . ." 435 U.S. at 436, n. 18.

This Court has frequently recognized the importance of uniformity in the application of federal laws. *NLRB* v. *Natural Gas Utility District*, 402 U.S. 600, 603-604 (1971). Certainly this rule applies to the economic regulatory scheme which comprises our "fundamental national economic policy." *City of Lafayette, supra*, at 419 (Burger, C.J. concurring).

Adoption of Respondent's plan for expanding the state-action exemption would necessitate an examination of every state's distribution of power. Freedom to engage in anticompetitive behavior would vary drastically from state to state. Hinging antitrust immunity on a determination of the degree of a city's autonomy would enmesh federal courts in the complex and confusing state law issue of whether a matter is of local or statewide concern.[12] Proceeding on a case-by-case basis

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[12] The vast majority of states look to each subject matter on a case by case basis to determine whether the matter is within the city's complete control. For example, pension plans for local policemen or firemen are of local concern in California, but are of statewide concern in Oregon and Rhode Island, and of mixed state and local concern in Colorado. *Richards* v. *Wheeler*, 10 Cal.App.2d 108, 51 P.2d 436 (1935); *City of Lagrande* v. *Public Employment Retirement Board*, 281 Ore. 137, 576 P.2d 1204 (1978); *Marro* v. *General Treasurer of City of Cranston*, 108 R.I. 192, 273 A.2d 660 (1971); *Huff* v. *Mayor and City Council of Colorado Springs*, 182 Colo. 108, 512 P.2d 632 (1973). The administration of police, fire, and water departments in Hawaii is of local concern, but the civil service and compensation for employees of those departments is of statewide concern. *Hawaii Government Employees Association* v. *County of Maui*, 59 Hawaii 65, 576 P.2d 1029 (1978). Civil service for city employees is of local concern in Ohio. *Lentz* v. *Edwards*, 90 Ohio St. 305, 107 N.E. 768 (1914). Collective bargaining with the city fire department is of mixed state and local concern in Colorado (*City of Aurora* v. *Aurora Firefighters' Prot.*, 193 Colo 437, 566 P.2d 1356 (1977)), while dismissal procedures for city officers is of local concern (*Ratcliff* v. *Kite*, 36 Colo.App. 261, 541 P.2d 88 (1975)), and the recall of city

(footnotes continued on following page)

pursuant to Respondent's approach, federal courts in different districts could well treat identical municipal anticompetitive conduct differently. The determinations in each case would depend on whether the city enjoyed home rule powers and whether the particular activity involved a matter of purely local concern. Often, as in the instant case, the state court may be silent on whether the matter is purely local, statewide or of mixed state and local character. An Arizona court said it well in noting that, "a perusal of cases from other jurisdictions indicates that there is a twilight zone wherein it is difficult to discern with positive assurance that legislation is of general concern, or is merely of local or municipal concern." *City of Tuscon* v. *Arizona Alpha of Sigma Alpha Epsilon*, 67 Ariz. 330, 336, 195 P.2d 562, 566 (1948).

In the present case, this problem is illustrated by the embroilment of the Colorado Courts over what matters constitute those "solely of local concern." Compare *State Farm Mutual Automobile Insurance Co.* v. *Temple*, 176 Colo. 537, 491 P.2d 1371 (1971), and *Hamilton* v. *City and County of Denver*, 176 Colo. 6, 490 P.2d 1289 (1971), with *Century Electric Service and Repair* v. *Stone*, 564 P.2d 953 (1977), and *City and County of Denver* v. *Tihen*, 77 Colo. 212, 235 P. 777 (1925). Would Respondent have application of the federal antitrust laws hinge upon the distinctions among an assessment tax on cemeteries (*Tihen, supra*); an occupational privilege tax on state workers (*Hamilton, supra*); an occupational tax on insurers (*State Farm Mutual Automobile Insurance Co., supra*); and a licensing scheme for electricians (*Century Electric Service and Repair, Inc., supra*)? Determination of what is "solely" local may change over time from new circumstances. *City and County of Denver* v. *Sweet*, 329 P.2d 441 (1958). Given the plethora of litigation on this issue in Colorado, it is difficult to understand how Respondent can argue that immunity for

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(footnotes continued from previous page)

186 Colo. 81, 525 P.2d 416 (1974)). A total earnings tax is "not a purely local" concern in Missouri (*Grant* v. *Kansas City*, 431 S.W.2d 89 (Mo. 1968)), nor is the collection of property taxes "a home rule power or function" in Illinois (*Bridgeman* v. *Korzen*, 54 Ill.2d 74, 295 N.E.2d 9 (1972)). But taxation of liquor is a matter of local concern there (*Mulligan* v. *Dunne*, 61 Ill.2d 544, 338 N.E.2d 6, *cert. denied* 425 U.S. 916 (1975)), and real property taxes are a matter of local concern in Connecticut (*Caulfield* v. *Noble*, 178 Conn. 81, 420 A.2d 1160 (1979)).

actions taken on "local matters" would reduce a municipality's exposure to lawsuits. (R.Br. 37-38). In fact, what Respondent really desires is the sort of "blanket" immunity rejected in *City of Lafayette, supra.*

VII.

CONCLUSION

For the foregoing reasons, the Tenth Circuit opinion, granting wholesale immunity to home rule cities, even in the absence of state policy, should be reversed.

Respectfully Submitted,

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IN THE

United States Court of Appeals

TENTH CIRCUIT

COMMUNITY COMMUNICATIONS COMPANY, INC.,
Plaintiff-Appellee,

v.

CITY OF BOULDER, COLORADO,
Defendant-Appellant.

No. 80-1882

Appeal from the United States District Court for the District of Colorado (D.C. No. 80-M-62)

Before SETH, Chief Judge, SEYMOUR, Circuit Judge, and BOHANON,* District Judge.

SEYMOUR, Circuit Judge.

* Of the Northern, Eastern and Western Districts of Oklahoma, sitting by designation.

We have been once again asked to reverse a grant by the district court of a preliminary injunction against the City of Boulder, Colorado (City) enjoining the City from enforcing a legislative restriction on the authority of Community Communications Company (CCC) to conduct its cable television business in Boulder. *See Community Communications Co.* v. *City of Boulder,* 485 F.Supp. 1035 (D. Colo.), *rev'd,* 630 F.2d 704 (10th Cir. 1980) (*Boulder I*). This time the district court preliminarily barred the City from limiting CCC's authorized operations to the geographic area described in Boulder City Ordinance No. 4515.[1] For the reasons set forth below, we believe that during the pendency of this litigation CCC should only be permitted to conduct such operations in the City of Boulder as are necessary to fully provide cable services to customers throughout the area contemplated by Ordinance No. 4515, and to customers outside that area who were actually connected to CCC's cable system as of May 18, 1981.[2] In

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[1] Ordinance 4515 states in pertinent part:

"*Section 1.* That the revocable permit granted under Ordinance No. 2846 to Colorado Televents, Inc. and its assignee, Community Communications Company, Inc., to conduct the business of a community antenna television system in the City of Boulder is hereby partially revoked, as hereinafter provided.

"*Section 2.* That Ordinance No. 2846 is hereby amended by the addition of the following:

"The grantee's right, permit license and privilege to erect, construct, operate and maintain on, under and above the present and future streets, alleys, highways and other public ways and places of the City of Boulder, such poles, lines, cables, wiring and related appurtenances as are necessary for the purpose of originating, receiving, amplifying and distributing television and radio signals to the inhabitants of the City of Boulder shall be exercised only within the geographical boundaries set forth in Exhibit A, attached to this ordinance and incorporated by reference herein.

"In addition to any and all of the remedies available to the City, a violation of this Section shall be grounds for immediate revocation of the permit granted in Ordinance No. 2846 and forfeiture of the performance bond referred to therein.

"The right, permit and privilege herein granted is subject to such reasonable requirements as the City Council may subsequently adopt concerning interconnection with other cable systems in the City of Boulder."

[2] This is the substance of this court's order of May 18 as clarified July 9, 1981.

addition, we conclude the City should be preliminarily barred from issuing any exclusive cable franchise to another cable company for any remaining portion of Boulder until a decision has been rendered on the merits of this case. To the extent the district court's preliminary injunction is inconsistent with these conclusions, it is reversed.

I.

The First Injunction

In 1964, the City Council of Boulder granted a nonexclusive, revocable permit to a predecessor of CCC, authorizing but not requiring the company to provide cable broadcasting services to all of Boulder. The permit was issued in the form of an ordinance allowing use of the public ways to string cable for a period of twenty years, with the reservation that the City Council could revoke the permit at its pleasure at any time. In 1966, the permit was assigned to CCC.

Under the permit, CCC chose for roughly 15 years to provide cable television service only to the University Hill area of Boulder, an area comprised of approximately 20% of Boulder's residential units and blocked off from normal reception of Denver television stations. In 1979, CCC informed the City of its plans to expand the area it served and the programming it carried. Shortly thereafter, the City received a request from Boulder Communications Company (BCC) for a cable television permit. BCC indicated that regardless of the action the City took in regard to CCC, it planned to begin building a new system as soon as possible after it received a permit.

In response to these developments, the City undertook a study of cable broadcasting technology and concluded that cable systems are natural monopolies. Consequently, the City became concerned that CCC, because of its headstart, would always be the only cable operator in Boulder if allowed to expand, even though it might not be the best operator Boulder could otherwise obtain. The City decided to place a moratorium on CCC's expansion in order to provide other companies the opportunity to make bids to service the remaining parts of Boulder before CCC could become so entrenched that new

entry would be impracticable. On December 18, 1979, the City Council enacted a moratorium to restrict CCC from expanding its area of service for 90 days.

On January 15, 1980, CCC filed a complaint against the City in federal district court. The complaint listed several grounds for relief including allegations that the City's actions violated section 1 of the Sherman Act, 15 U.S.C. § 1, and the First Amendment. CCC continued to string cable. When the City tore down some of the new cable, CCC sought a preliminary injunction from the district court to enjoin enforcement of the moratorium.

In its March 17, 1980 decision, the district court recognized that the case presented significant First Amendment questions, but found them "not now ripe for decision." *Boulder I*, 485 F.Supp. at 1040. It focused instead on the Sherman Act claim and granted a preliminary injunction against the City on that basis. The City appealed.

This court reversed in a May 28, 1980 decision. We concluded that the trial court had erred as a matter of law in grounding a preliminary injunction on the Sherman Act claim. *See Boulder I*, 630 F.2d 704, 708 (10th Cir. 1980). Because authorization to use public ways for provision of cable service is a matter of local governmental concern,[3] we held the home-rule City of Boulder to be immune from antitrust liability under the state action doctrine of *Parker* v. *Brown*, 317 U.S. 341 (1943). We noted that the district court had "expressed no other basis for the restraining order than the antitrust factor." *Boulder I*, 630 F.2d at 708.

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[3] We did not hold in *Boulder I* that cable television is matter of *purely* local concern. There may be a significant state interest in many aspects of the operation of this communication medium. A home rule city may pass legislation regarding a "matter of 'mixed' state and local concern," provided the regulations do not conflict with legislation enacted by the state. *City of Aurora* v. *Martin*, 181 Colo. 72, 507 P.2d 868, 869 (1973) (*quoting Woolverton* v. *Denver*, 146 Colo. 247, 361 P.2d 982 (1961)). *See Denver Urban Renewal Auth.* v. *Byrne*, 618 P.2d 1374, 1385 (Colo. 1980); *Century Elec. Serv. & Repair, Inc.* v. *Stone*, 193 Colo. 181, 564 P.2d 953, 955 (1977) (en banc); *Vick* v. *People*, 166 Colo. 565, 445 P.2d 220, 221 (1968) (en banc), *cert. denied*, 394 U.S. 945 (1969).

II.

The Second Injunction

The 90-day moratorium had expired by the time of our decision in *Boulder I*, so the City enacted emergency ordinances on June 3 and June 24 placing further temporary restrictions on CCC's expansion in Boulder while the City considered its alternatives. By this time, three companies besides CCC had submitted proposals to provide cable services to Boulder. However, these other companies, including Boulder Communications Company, indicated they would not accept a permit in any area where CCC had authority to string cable.

The City concluded that direct competition in Boulder between cable companies within the same geographic area will not be possible in the foreseeable future. It settled on districting as the best practicable alternative. Under the City's plan, CCC will be restricted to servicing a single district comprising approximately one-third of the City's population. One or more cable companies will be granted permits to service other districts within Boulder. The City believes that although it cannot have direct competition, the districting plan will at least provide comparison. That is, by having more than one cable company operating in Boulder, the City will have a comparative basis for evaluating permit renewal applications. The City also believes that districting will achieve diversity of cable communications, especially if interconnection is required among cable systems whereby each cable company would make available to its subscribers some portion of the programming carried by other cable companies. In sum, through districting the City hopes to provide for its citizens multipurpose, state-of-the-art cable communication services, including, for example, not only extensive programming but also two-way communications through the cable system.

To begin implementing its districting plan, the City enacted Ordinance No. 4515, *see* note 1 *supra*, which partially revoked CCC's long-standing permit and replaced it with a permanent geographic limitation on CCC's authority to operate a cable system in Boulder. CCC responded by filing a second

motion with the district court for a preliminary injunction. The City cross-moved to enjoin CCC from violating the limitations of the new ordinance.

The district court denied the City's motion and granted another preliminary injunction in favor of CCC, reasoning that the cable company had demonstrated irreparable harm and a reasonable probability of success on the merits of both its Sherman Act and First Amendment claims. *See Community Communications Co.* v. *City of Boulder,* 496 F.Supp. 823 (D. Colo. 1980) (*Boulder II*). On appeal, the City challenges the trial court's reasoning on both grounds.

As an initial matter, we note that the cable broadcasting industry has a prior history of federal, state, and local regulation. *See, e.g.,* Besen, *The Deregulation of Cable Television,* 44 Law & Contemp. Prob. 79 (1981); Comment, *Technology Meets Bureaucracy, The FCC's Policy for Two-Way Television,* 31 Fed. Com. L.J. 413 (1979). Generally, regulation has been premised upon cable companies' need to use public streets and rights of way to lay or string their cable. Local regulation has commonly taken the form of licensing or franchising cable companies. *See generally* Albert, *The Federal and Local Regulation of Cable Television,* 48 Univ. Colo. L. Rev. 501, 508-13 (1977). The question in the present case is whether the City has gone too far under either the antitrust laws or the First Amendment in its efforts to regulate CCC's cable operations.

A. Antitrust Immunity

To the extent the lower court grounded its order on the Sherman Act claim, it is in error. In *Boulder I,* we reversed the district court's earlier grant of an injunction because we held the City immune from antitrust liability for its action in placing a moratorium on CCC's expansion.[4] The reasoning of *Boulder I* applies here as well. That the geographic restriction is now a permanent one, rather than a 90-day one, does not alter the applicability of the *Parker-Midcal* doctrine discussed at length in *Boulder I. See* 630 F.2d at 707-08. The districting program

[4] The Supreme Court has granted certiorari on this issue. *See* 49 U.S.L.W. 3736 (Apr. 6, 1981).

remains a clearly expressed act of government; active supervision and enforcement is being pursued. *See California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980).

The district court reasoned that "actively supervised" under *Midcal, id.* at 105, means "the City must take control of the future of cable television in Boulder in a manner which is actually *proprietary.*" *Boulder II*, 496 F.Supp. at 828 (emphasis added). The district court concluded, therefore, that the City is not entitled to antitrust immunity under our reading of *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978). *See Boulder I*, 630 F.2d at 708 (antitrust immunity not extended in *Lafayette* to government acting in proprietary fashion). The district court's reasoning is flawed because if active supervision is to be equated with proprietary action, governmental antitrust immunity could never exist.

B. First Amendment

CCC contends that the districting ordinance violates the First Amendment in several ways. First, the ordinance is said to constitute an unlawful prior restraint on CCC's right to disseminate information because the ordinance denies CCC the right to reach two-thirds of its potential audience. Second, the ordinance is alleged to be an unconstitutional content-based restraint on expression, because it bans CCC's communications from most of Boulder so that a "better" speaker, *i.e.*, one who will offer special services such as two-way communications, may service that area. Fiinally, CCC claims the ordinance is not the least restrictive means for achieving whatever legitimate interests the City may have. Thus, CCC essentially argues that the City's ordinance must be summarily declared unconstitutional because analogous prohibitions on a newspaper's right to reach even a small portion of its audience would be struck down as First Amendment violations. CCC contends that cases involving regulation of wireless broadcasters are wholly inapposite. The district court apparently accepted this view, for it stated that any differences between the freedom of newspapers and that of cable operators are not relevant to this case. *See Boulder II*, 496 F.Supp. at 829.

The City responds that (1) cable companies should not be analogized in every respect to newspapers for First Amendment purposes; (2) cable systems are natural monopolies, so that subjecting them to some reasonable regulation designed to achieve optimal use of the cable broadcasting medium does not offend the First Amendment; and (3) the ordinance, contemplating as it does the ultimate interconnection of all cable systems operating in Boulder, is a content-neutral regulation that promotes citizenry First Amendment interests in diverse and state-of-the-art communications services and programming, without impeding any cable operator's ability to reach audiences, since all audiences in the City will ultimately be reachable through interconnection.

These contentions reach us in the context of requests by both CCC and the City for preliminary injunctive relief. The touchstone for obtaining such relief is a showing of irreparable harm coupled with a substantial likelihood of success on the merits. *See Lundgrin* v. *Claytor,* 619 F.2d 61, 63 (10th Cir. 1980). "There must exist a probable right and a probable danger." *Crowther* v. *Seaborg,* 415 F.2d 437, 439 (10th Cir. 1969). However, where irreparability exists and the balance of hardships tips in favor of a movant, the probability-of-success requirement may be somewhat relaxed: "[I]t will ordinarily be enough that the plaintiff has raised questions going to the merits so serious, substantial, difficult and doubtful as to make them a fair ground for litigation and thus for more deliberate investigation." *Lundgrin,* 619 F.2d at 63; *see Jack Kahn Music Co.* v. *Baldwin Piano & Organ Co.,* 604 F.2d 755, 758-59 (2d Cir. 1979).

Applying these principles here, we agree with the district court that this case raises substantial, difficult, and novel First Amendment concerns. Cable operators, like publishers and wireless broadcasters, are entitled to First Amendment protection. *See Midwest Video Corp.* v. *FCC,* 571 F.2d 1025, 1052-57 (8th Cir. 1978), *aff'd on other grounds,* 440 U.S. 689 (1979); *Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 43-51 (D.C. Cir.), *cert. denied,* 434 U.S. 829 (1977). We also agree with the district court that "[t]o the extent that First Amendment rights are infringed, irreparable injury is presumed." *Boulder II,* 496

F.Supp. at 826 (citing *Elrod* v. *Burns*, 437 U.S. 347, 373 (1976)). But we believe that in comparing "the competing claims of irreparable injury," *id.*, the district court failed to consider that the citizens of Boulder also have significant First Amendment interests at stake.[5] The City claims that its districting plan will advance its citizens' First Amendment interests in high quality and diverse cable communications services and programming, including two-way cable services that will enable its citizens to be disseminators of information as well as recipients.

With respect to the likelihood of success on the merits, the specific issue here is whether the City's geographic districting plan for cable operators violates the First Amendment. More broadly, the issue concerns the nature and degree of governmental regulation that the First Amendment permits over cable operators.

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[5] The First Amendment protects not only the right to disseminate, but also the public's interest in the receipt of diversified communications. "That Amendment rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public . . . ." *Associated Press* v. *United States*, 326 U.S. 1, 20 (1945). *See National Assoc. of Theatre Owners* v. *FCC*, 420 F.2d 194, 207 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 922 (1970). And the First Amendment right to receive information has been upheld in various contexts. See, *e.g.*, *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976); *Procunier* v. *Martinez*, 416 U.S. 396, 408-09 (1974); *Kleindienst* v. *Mandel*, 408 U.S. 753, 762-63 (1972).

The Supreme Court has relied on the uniqueness of the wireless broadcasting medium coupled with the recognition that "[i]t is the purpose of the First Amendment to preserve an *uninhibited* marketplace of ideas . . . rather than to countenance *monopolization* of that market," and that "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount," to uphold affirmative regulation by the Government to enhance the diversity of information in broadcasting. *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 390 (1969) (emphasis added). Whether comparable considerations constitutionally permit similar regulation of cable has been the subject of much attention. *See, e.g.*, Note, *Midwest Video Crop* [*sic*] v. *FCC: The First Amendment Implication of Cable*

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At this juncture, facing as we do challenges to preliminary injunctive relief and an incomplete factual record, we cannot dispose of all the points raised by CCC and the City.[6] We do,

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Television Access, 54 Ind. L.J. 109, 116-23 (1978); Note, *FCC Regulation of Cable Television,* 54 N.Y.U.L. Rev. 204, 229-35 (1979); Note, *FCC Regulation of Cable Television Content,* 31 Rutgers L. Rev. 238, 248-58 (1978). Some commentators believe that through "structural" forms of regulation, such as mandatory access requirements and regulation limiting ownership concentration, it is possible, indeed desirable, to promote diversity in cable television while avoiding some of the objectionable aspects of broadcast regulation. *See, e.g.,* Bazelon, *The First Amendment and the "New Media" — New Directions in Regulating Telecommunications,* 31 Fed. Com. L.J. 201 (1979); Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media,* 75 Mich. L. Rev. 1, 26-37 (1976); Price, *Taming Red Lion: The First Amendment and Structural Approaches to Media Regulation,* 31 Fed. Com. L.J. 215 (1979). *See also* Lee, *Antitrust Enforcement, Freedom of the Press, and the "Open Market": The Supreme Court on the Structure and Conduct of Mass Media,* 32 Vand. L. Rev. 1249 (1979). We raise these points here to show that the First Amendment interests of cable viewers cannot be left out of the equation for permissible regulation of cable companies. *See generally Home Box Office, Inc.* v. *FCC,* 567 F.2d 9, 48-49 (D.C. Cir. 1977).

[6] CCC asserts, and the district court seemingly agrees, that the districting ordinance is only one aspect of a regulatory plan that will "inexorably" lead to some regulation of programming, such as mandated reservation of some channels for public access. To the extent true, this allegation would raise a significant First Amendment issue. *See FCC* v. *Midwest Video Corp.,* 440 U.S. 689, 709 n.19 (1979). A similar issue surrounds Ordinance 4515's language that the City may in the future require "reasonable . . . interconnection with other cable systems in the City of Boulder." *See* note 1 *supra.* The City views interconnection as undercutting CCC's claim that the districting ordinance bars it from reaching a huge segment of its audience. Interconnection, the City contends, will guarantee every cable operator a city-wide audience in that a single network of cable wires will be shared by all. CCC, on the other hand, likens interconnection to coerced public access to its cable channels in that interconnection, according to CCC, will deprive one cable permit holder of the editorial discretion over whether to carry the programming of another. We, of course, intimate no view at this juncture on how these issues might be resolved, for on the present record they are not fully ripe for consideration. Nothing in the record now suggests

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however, agree with the City's contention that it was inappropriate for the district court to summarily apply to cable operators the First Amendment principles governing newspapers. The nature and degree of protection afforded to First Amendment expressions in any given medium depends upon the medium's particular characteristics. For example, the degree to which the First Amendment shields the editorial discretion of wireless broadcasters differs substantially from the degree to which newspaper publishers are shielded from governmental interference. *Compare Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969), *with Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). The Supreme Court has repeatedly emphasized that "[e]ach medium of expression, of course, must be assessed for First Amendment purposes by standards suited to it," *Southeastern Promotions, Ltd.* v. Conrad, 420 U.S. 546, 557 (1975), for "differences in the characteristics of news media justify differences in the First Amendment standards applied to them." *Red Lion*, 395 U.S. at 386. *See, e.g., Metromedia, Inc.* v. *City of San Diego*, 49 U.S.L.W. 4925, 4928, 4932, 4935 (U.S. July 2, 1981); *Heffron* v. *International Society for Krishna Consciousness*, 49 U.S.L.W. 4762, 4765 (U.S. June 22, 1981); *Schad* v. *Borough of Mount Ephraim*, 49 U.S.L.W. 4597, 4601 (U.S. June 1, 1981).

The attributes of cable broadcasting technology indicate that the nearly absolute strictures against direct[7] governmental regulation of newspapers' dissemination of information cannot

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that the City has taken any affirmative steps toward reserving channels for public access. And regarding interconnection, we do not know what form it will take, or indeed, whether it will, or even can, practicably occur in Boulder. Depending on how, or if at all, these First Amendment issues ripen at trial, the district court will have an opportunity to resolve them with the benefit of a fully-developed factual record.

[7] Nondiscriminatory application of general laws to the business aspects of publishing has been given constitutional approval, even though enforcement may have the *indirect* effect of lessening a publisher's ability to disseminate information. *See, e.g., Citizen Publishing Co.* v. *United States*, 394 U.S. 131, 139 (1969) (antitrust laws); *Associated Press* v *NLRB*, 301 U.S. 103, 130-31 (1937) (labor relations laws).

be applied in wholesale fashion to cable operators. To disseminate information, a newspaper need not use public property in the same way that a cable operator does. A newspaper may reach its audience simply through the public streets or mails, with no more disruption to the public domain than would be caused by the typical pedestrian, motorist, or user of the mails. But a cable operator must lay the means of his medium underground or string it across poles in order to deliver his message. Obviously, this manner of using the public domain entails significant disruption, especially to streets, alleys, and other public ways. Some from of permission from the government must, by necessity, precede such disruptive use of the public domain. We do not see how it could be otherwise.[8] A city needs control over the number of times its citizens must bear the incovenience of having its streets dug up and the best times for it to occur. Thus, government and cable operators are tied in a way that government and newspapers are not.[9]

A second basis for government regulation of cable, and the one directly relied upon by the City in enacting its ordinance, is "medium scarcity." More specifically, the City asserts that there are physical and economic limitations on the number of

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[8] The Federal Communications Commission has written:

"[L]ocal governments are inescapably involved in the [franchising] process because cable makes use of streets and ways and because local authorities are able to bring a special expertness to such matters . . . ."

37 Fed. Reg. 3276 (1972).

[9] Unlike publishing, cable television has been and remains a highly regulated industry. *See generally* Albert, *The Federal and Local Regulation of Cable Television,* 48 Univ. Colo. L. Rev. 501 (1977); Barnett, *State, Federal, and Local Regulation of Cable Television,* 47 Notre Dame Law. 685 (1972); Besen, *The Deregulation of Cable Television,* 44 Law & Contemp. Prob. 77 (1981); Williamson, *Franchise Bidding for Natural Monopolies—in General and With Respect to GATV,* Bell J. Econ. (1976); Comment, *Technology Meets Bureaucracy: the FCC's Policy for Two-Way Television,* 31 Fed. Com. L.J. 413 (1979); Note, *FCC Regulation of Cable Television,* 54 N.Y.U.L. Rev. 204 (1979); Comment, *Regulating CATV: Local Government and the Franchising Process,* 19 S.D. L. Rev. 143 (1974).

cable systems that can practicably operate in a given geographic area. In physical terms, the City alleges a sheer limit on the number of cables that can be strung on existing telephone poles. Economically, the City argues that cable broadcasting is a monopolistic industry because it is not economically viable for more than one cable company to operate in any given geographic area. Together, the City contends, these limitations give cable companies the character of a natural monopoly and thus make the cable broadcasting medium "scarce" in much the same way that the finiteness of the electromagnetic spectrum makes wireless broadcasting a medium of essentially limited access.

Inherent limitations on the number of speakers who can use a medium to communicate has been given as a primary reason why extensive regulation of wireless broadcasting is constitutionally permissible. *See Columbia Broadcasting System, Inc.* v. *Democratic National Committee,* 412 U.S. 94, 101 (1973); *Red Lion Broadcasting Co.* v. *FCC,* 395 U.S. 367, 388 (1969); *National Broadcasting Co.* v. *United States,* 319 U.S. 190, 226 (1943). When such limitations exist, and the medium requires use of a limited and valuable part of the public domain, the government must step in to allocate entry into that medium. In such circumstances, it confuses analysis to say that denying a potential disseminator the right to reach an audience is a prior restraint. No individual disseminator has the constitutional right to be the particular person who obtains the privilege to use the medium. *See Red Lion,* 395 U.S. at 389 (wireless broadcast "license has no constitutional right to be the one who holds the license").

In rejecting the notion of "medium scarcity," the district court preliminarily found that "competition on the poles" among cable operators is possible. *Boulder II,* 496 F.Supp. at 830. It is not clear whether this was a finding that no economic monopoly exists in Boulder, or whether this was only a finding that no physical law really limits the number of cables that can be laid or strung side by side. In any event, relying on *Miami Herald Publishing Co.* v. *Tornillo,* 418 U.S. 241 (1974), the district court rejected economic monopoly as justifying any degree of regulation whatsoever. In *Miami Herald,* notwith-

stanc..g contentions that the nation is dominated by one-newspaper cities and the economic conditions have made new entry into the newspaper industry virtually impossible, the Supreme Court held that a state imposed public right of access to the pages of a newspaper violates the First Amendment. The district court concluded from *Miami Herald* that "scarcity" within the cable broadcasting medium arising from economic conditions could in no way justify regulation of cable operators. *Boulder II*, 496 F.Supp. at 830. *Miami Herald*, however, must be read in context. The Court was writing about newspapers, a communication medium protected by a long-standing and powerful tradition that keeping government's hands off is the best way to achieve the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open . . . ." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Moreover, *Miami Herald* involved an effort by state government to compel public access to a medium that is not tied to government in the way cable companies necessarily are. There, the characteristic of economic scarcity was unrelated to a disruptive use of the public domain requiring a government license. The state of Florida simply felt that access to the pages of newspapers was needed to ensure presentation of all differing viewpoints within the marketplace of ideas, and relied upon notions of economic concentration the industry to justify its control upon newspapers. It was in this context that the Court concluded "economic scarcity," without more, could not overcome the First Amendment objection against requiring a private newspaper to print what Florida's right-of-reply statute dictated.

The cable broadcasting medium presents very different circumstances.[10] As already noted, *see* note 9 *supra*, this industry has always been regulated in many respects. There is no tradition of nearly absolute freedom from government control. Most importantly, a cable company must significantly

[10] For an interesting view on partial regulation of the mass media, see Bollinger, *Freedom of the Press and Public Access: Toward a Theory of Partial Regulation of the Mass Media*, 75 Mich. L. Rev. (1976).

impact the public domain in order to operate; without a license, it cannot engage in cable broadcasting to disseminate information. This is exactly opposite of the situation in *Miami Herald.*

If when faced with a request for a license from a cable operator, government reasonably anticipates the kind of "medium scarcity" we have discussed, it must be permitted to deal with the effects of the scarcity that may attend the use of the license it is about to issue. That is, government must have some authority in such a context to see to it that optimum use is made of the cable medium in the public interest. In view of the lengthy franchises that cable operators seem to require, the City's districting ordinance might be justifiable as a means to avoid locking into an outmoded or less than state-of-the-art cable communications system.

The conclusion that natural monopoly is a constitutionally permissible justification for some degree of regulation of cable operators does not mean that the full panoply of principles governing the regulation of wireless broadcasters necessarily applies to cable operators. The general rationale for permitting government regulation may be the same, but the criteria upon which regulatory decisions may be made might differ. As the Supreme Court has stressed, "[e]ach method of communicating ideas is a 'a law unto itself' and that law must reflect the 'differing natures, values, abuses and dangers' of each method." *Metromedia,* 49 U.S.L.W. at 4928 (quoting *Kovacs* v. *Cooper,* 336 U.S. 77, 97 (1949)). For example, differences in (1) the degree of natural monopoly or "scarcity" characterizing the medium, (2) the pace and potential for technological change,[11] or (3) the uses and possible uses of the medium such as two-way cable communications or even interconnection, might make kinds of regulations constitutionally permissible in one medium that would be forbidden in another. But we caution: the power to regulate is not one whit broader than the need that evokes it. Whether that power has been permissibly exercised by the City in this case calls for a particularized

[11] Changes in technology may also alter, over time, the scope of constitutionally permissible regulation within a particular medium.

inquiry into the unique attributes of the cable broadcasting medium. The district court is best suited for such inquiry in the first instance upon a fully developed factual record.

In sum, the significant First Amendment issues create a presumption of irreparable harm on both sides in this case and present a fair ground for litigation for both parties. Each side has moved for preliminary relief. Balancing the hardships, we cannot agree with the district court's essentially one-sided grant of preliminary injunctive relief to CCC. Rather, we believe that relief *pendente lite* must be tailored so as to minimize irreparable harm to both sides and at the same time to permit a meaningful grant of whatever permanent relief may be warranted. *Cf. Taylor Wine Co.* v. *Bully Hill Vineyards, Inc.*, 569 F.2d 731 (2d Cir.), *appeal after remand*, 590 F.2d 701 (1978) (extensive fashioning of preliminary injunctive relief on use of "Taylor" trademark as between Taylor Wine Company and Mr. Walter S. Taylor). *See also Tracy* v. *Salamack*, 572 F.2d 393, 396-97 (2d Cir. 1978); *International Controls Corp.* v. *Vesco*, 490 F.2d 1334, 1347 & n.18 (2d Cir. 1974); *Omega Importing Corp.* v. *Petri-Kine Camera Co.*, 451 F.2d 1190, 1197 (2d Cir. 1971). This is best accomplished by freezing the parties in their present circumstances until trial on the merits, *see* note 2 and accompanying text *supra*, rather than either by allowing CCC to continue its expansion in complete derogation of Ordinance No. 4515, or by permitting the City to strictly enforce the boundaries of its ordinance, which would leave the City free to grant exclusive cable franchises outside those boundaries.

Taking into consideration the concepts we have outlined in this opinion, the task for the district court at trial is to determine, upon final fact findings, whether cable's unique attributes warrant, in First Amendment terms, the nature and extent of regulation the City seeks to impose on cable companies in Boulder. In so doing, the district judge must fashion the First Amendment standards to be applied to this new medium under the circumstances of this case.

Reversed and remanded for trial on the merits.